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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Southwest Educational Development Laboratory

File: B-298259

Date: July 10, 2006

Wesley A. Hoover for the protester.

Jeffrey C. Morhardt, Esq., Department of Education, for the agency.

Jeanette M. Soares and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of evaluation of small business subcontracting plan as not consistent with the solicitation is denied where protest is premised upon misinterpretation of the solicitation.

DECISION

Southwest Educational Development Laboratory (SEDL) protests the award of a contract under request for proposals (RFP) No. ED-05-R-0006 to Edvance Research Inc. by the Department of Education for the operation of the Southwestern Regional Educational Laboratory.

We deny the protest.

The RFP, issued on July 15, 2005, was for a 5-year fixed-price, award fee contract to operate the laboratory. The evaluation factors were price, past performance and technical merit. The technical merit factor had three subfactors: soundness and responsiveness of technical plan to statement of work and expertise, experience, availability and commitment of relevant personnel (90 points); management and organizational experience and capability (10 points); and small business subcontracting plan (25 points). Although price was said to be a substantial factor in the source selection, the quality factors, including technical merit and past performance, when considered together were significantly more important than price.

On September 20, 2005, the agency issued amendment No. 4 which added the following with regard to the small business subcontracting plan subfactor:

In order to be eligible for contract award, an offeror must propose a subcontracting plan with a **minimum of 15%** of the total contract dollars to small business, small disadvantaged business, woman-owned small business, HUBZone small business or Service-Disabled Veteran-Owned Small Business. An award will **not** be made to an offeror without a subcontracting plan that proposes, at a minimum, 15% of total contract dollars going to small businesses by time of award.

All offerors considered eligible for contract award shall have until time of award to finalize small business subcontracting partnerships.

A subcontracting plan that proposes work in excess of 15% of the total contract dollars subcontracted to a small business, small disadvantaged business, woman-owned small business, HUBZone small business or Service-Disabled Veteran-Owned Small Business will receive **up to 25 points**. These points will be added to a technical score to arrive at a total evaluated score for purposes of award decision.

The Department will establish a competitive range based on Technical merit and cost, without scoring the subcontracting plan. However, a subcontracting plan must be negotiated by time of award, at which time the additional points for the subcontracting plan will be added.

RFP amend. 4, at 6 (emphasis in original).

The protester and awardee submitted proposals by the October 3, 2005 closing date. The agency evaluated these proposals and included both proposals in the competitive range. The agency opened negotiations with both offerors by sending technical and business negotiation questions. In one of the questions SEDL received concerning its small business subcontracting plan, the agency notified SEDL that its proposed major subcontractor was not a small business concern as claimed in the proposal and in order to be credited under this subfactor a small business concern must be proposed. AR, Tab 22, SEDL First Round of Technical and Business Negotiation Questions.

The offerors' responses to the written negotiation questions and corresponding revisions to the proposals became their interim revised proposals. In its interim revised proposal, SEDL changed its small business subcontracting plan to remove the ineligible large business and increase the portion of work subcontracted to small businesses to 18.72 percent. AR, Tab 26, SEDL Interim Revised Business Proposal, at 7.

On December 1, 2005, the agency issued amendment No. 5 to the RFP. Amendment No. 5 altered the evaluation scheme so that small businesses would automatically receive the full 25 points allotted for the small business subcontracting plan subfactor and large businesses would receive 3 points for every percentage point above the 15-percent minimum requirement up to the maximum of 25 points. The remainder of the evaluation scheme of the small business subcontracting plan subfactor was identical to that set forth in Amendment No. 4. RFP amend. 5, at 6.

Following the agency's evaluation of the interim revised proposals, the protester and awardee received a final round of negotiation questions on December 6. The instructions accompanying these questions told offerors to submit their responses to the questions as well as final revised technical and cost proposals by December 19, 2005. AR, Tab 42, E-mails to/from SEDL, at 11. The same day it received the final round of negotiation questions, SEDL sought clarification about how fractions of a percentage point would be evaluated for the small business subcontracting plan subfactor and indicated that it might revise its plan depending on the agency's response. AR, Tab 42, E-mails to/from SEDL, at 17.

The next day SEDL sent the contracting officer a lengthy e-mail expressing several concerns with amendment No. 5. The concerns relevant to this protest included SEDL's expressed belief that the amendment's evaluation scheme unfairly favored small business offerors and that the amendment's introduction at this juncture of the competitive process would irreparably jeopardize SEDL's opportunity for award. AR, Tab 42, E-mails to/from SEDL, at 18. The agency responded by holding a conference call with SEDL on December 12. Both parties agree that during this conference call the agency confirmed that SEDL would receive 25 points if it increased its small business subcontracting plan to 23 percent of the contract dollar work.¹ AR at 7; Protest at 2.

The agency evaluated the final revised proposals and found the protester's and awardee's proposals to be essentially equal under the technical merit and past performance factors (notwithstanding that SEDL's point score for these factors was slightly higher), not counting the small business subcontracting plan factor. The offerors also proposed identical prices but different award fees; the agency considered these differences insignificant.² AR, Tab 38, Negotiation Memorandum,

¹ While the agency also maintains that it encouraged SEDL to increase its proposal's competitiveness by changing its small business subcontracting plan, AR at 7, the protester denies receiving any such encouragement. Protester's Comments at 1. We need not resolve this dispute.

² Amendment No. 2 to the RFP included a price range for the total value of the contract based on projected Congressional appropriations. The agency felt that the offerors' initial price proposals did not adequately consider this price range and, in
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at 31. SEDL's proposal received 12 of the 25 points allotted for the small business subcontracting plan, 3 points for each of the 4 percentage points in small business subcontracting that SEDL proposed above 15 percent, while the awardee received 25 points because it was a small business concern. Id. at 32-33. The record indicates that this subfactor was the ultimate award discriminator among the proposals.

SEDL learned about the agency's evaluation of both proposals at its debriefing and protested the award to the agency. Following the agency's denial of the protest, SEDL filed this protest.

SEDL alleges that the agency did not follow the evaluation procedure delineated in amendment No. 5 to the RFP in evaluating the small business subcontracting plans. SEDL contends that under amendment No. 5 the agency should have established the competitive range based on the technical and past performance ratings without regard to scoring the small business subcontracting plan subfactor, then negotiated "the best small business subcontracting plan with the top-ranked proposal" and made the award at the conclusion of that negotiation.³ Protest at 2. SEDL asserts that as the offeror with the highest-ranked proposal prior to evaluation of the small business subcontracting plan, it was prejudiced by the agency's failure to hold further negotiations about its plan because that failure prevented SEDL from reaching the small business contracting figure of 23 percent necessary to retain its position as the top-ranked proposal.

We find the protester's interpretation of the RFP is unreasonable. To be reasonable, an interpretation of the solicitation must be consistent with the solicitation when read as a whole and in a reasonable manner. M & M Ret. Enters., LLC, B-297282, Dec. 15, 2005, 2005 CPD ¶ 224 at 3. Here, the RFP clearly indicates that at the time of award decision (or time of award) the agency would evaluate the small business subcontracting plans in the offerors' final proposals as part of the total evaluation and would then select an awardee based on this evaluation. This is unambiguously

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the first round of negotiation questions, directed their attention to it. Consequently, in their interim revised proposals, both offerors proposed the same price within this range, which was also identical to the independent government cost estimate. AR, Tab 38, Negotiation Memorandum, at 22.

³ SEDL maintains that the agency confirmed this interpretation in the December 12 conference call. Nothing in the agency record substantiates SEDL's recollection. To the extent SEDL's allegation relies on advice given during the conference call, we note that oral advice from an agency that is inconsistent with the unambiguous terms of the solicitation is not binding on the government, and an offeror relies on oral advice that is inconsistent with solicitation terms at its peril. Delphinus Eng'g, Inc., B-296902, B-296906.2, Sept. 20, 2005, 2006 CPD ¶ 7 at 5.

indicated by the final sentence in the penultimate paragraph of Amendment No. 4 (quoted above), which was restated in amendment No. 5 as follows, “These points [assigned for the small business subcontracting plan subfactor] will be added to a technical score to arrive at a total evaluated score for purposes of award decision.” The final paragraph in amendment No. 4 (quoted above), which was restated in amendment No. 5, creates some confusion, given that it suggests that the evaluation points for this subfactor would only be added “by time of award.” However, that final paragraph only indicated that the subcontracting plan would not be considered in establishing the competitive range, which in this case was already established at the time amendment No. 5 was issued. Consistent with that final paragraph, the agency then again provided SEDL with the opportunity to amend its small business subcontracting plan to maximize its possible points under this subfactor.

SEDL’s actions during the procurement demonstrate that it understood, or in any event should have understood, the RFP in this respect. The record shows that SEDL knew that the agency permitted and expected changes in its subcontracting plan between the submission of initial and final proposals. In fact, SEDL’s interim revised proposal contained changes to its subcontracting plan, and amendment No. 5 caused SEDL to consider making more changes. See AR, Tab 42, E-mails to/from SEDL, at 17.

Moreover, the concerns SEDL expressed to the agency about amendment No. 5 reveal that SEDL knew the subcontracting plan would be evaluated to determine which offeror within the competitive range received the award. As indicated, SEDL complained to the agency because the amendment’s evaluation scheme for the subcontracting plan assertedly gave small businesses an unfair advantage over SEDL. SEDL’s expressed concerns about being unable to offer a competitive small business subcontracting plan vis-à-vis a small business is essentially an acknowledgment that the agency would evaluate the small business subcontracting plans of all final proposals before making an award decision.

SEDL also challenges Edvance’s past performance rating based on the past performance rating of Edvance’s predecessor company and key personnel, because the predecessor company “became a defunct company soon after the creation of Edvance Research” and both companies are apparently being pursued for “financial and management issues.” Protest at 2. This protest ground is untimely raised under our Bid Protest Regulations. SEDL learned about Edvance’s past performance evaluation at its debriefing and, presumably, knew about Edvance’s financial and management issues at that time but did not raise this allegation in its agency-level protest. Thus, in order to be timely, SEDL was required to assert this protest ground within 10 days of when the basis for protest was known, and SEDL’s failure to raise this protest ground within 10 days of the debriefing in its agency-level protest renders untimely the subsequent raising of this protest ground in its protest to our

Office.⁴ 4 C.F.R. § 21.2(a)(2) (2006); Foundation Eng'g Scis., Inc., B-292834, B-292834.2, Dec. 12, 2003, 2003 CPD ¶ 229 at 3 n.2.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ In any case, this allegation is without merit. Information regarding predecessor companies and key personnel who have relevant experience should be taken into account in the past performance evaluation. FAR § 15.305(a)(2)(iii); Trailboss Enters., Inc., B-297742, Mar. 20, 2006, 2006 CPD ¶ 64 at 4. Moreover, upon receiving Edvance's protest, the agency investigated the protester's allegation and did not find it valid. AR, Tab 40, Edvance Past Performance Evaluation Report at 8th -10th unnumbered pages.